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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1237

GENERAL ATOMIC COMPANY,
Petitioner,

v.

EDWIN L. FELTER, ETC., ET AL.,
Respondents.

On Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus to the District Court for the First Judicial District, Santa Fe County, New Mexico

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BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

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BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

OPINIONS BELOW

The December 16 and 27, 1977 decisions and partial final judgments of the District Court, Santa Fe County, New Mexico, appear at Pet. App. 1a-21a. The January 4, 1978 order of the New Mexico Court of Appeals certifying appeal of those judgments to the New Mexico Supreme Court appears at Pet. App. 30a. The January 13, 1978

order of the New Mexico Supreme Court accepting the certification and denying a stay of trial pending appeal appears at Pet. App. 22a. The February 1, 1978 order of the New Mexico Supreme Court again denying a stay of the trial appears at Pet. App. 23a-24a. The February 22, 1978 order of the New Mexico Supreme Court expediting the certified appeal appears at App. A, *infra*. None of the foregoing decisions and orders is reported.

JURISDICTION

The partial final judgments of the District Court, Santa Fe County, New Mexico, were issued on December 16 and 27, 1977. The motion for leave to file the petition for a writ of mandamus and the petition were filed on March 3, 1978. This Court's jurisdiction is invoked by petitioner under 28 U.S.C. § 1651.

QUESTIONS PRESENTED

1. Whether this Court should entertain a petition for mandamus when the lower state court orders sought to be reviewed are pending on expedited appeal to the State Supreme Court.

2. Whether the orders of the State District Court violate the mandate of this Court in *General Atomic Company* v. *Felter*, No. 76-1640. decided October 31, 1977.

STATEMENT

1. Petitioner General Atomic Company ("GAC"), a partnership of Gulf Oil Corporation and Scallop Nuclear, Inc., is a party to several contracts for the supply of uranium to various utility companies (Pet. 4-5).[1] In 1973,

[1] Those contracts were assigned to GAC by Gulf. Gulf had acquired them in the form of contracts and letters of intent as part of its purchase of United Nuclear's interest in Gulf United Nuclear Fuels Corporation, a Gulf-United Nuclear joint venture corporation.

respondent United Nuclear Corporation ("UNC")[2] entered into a complex agreement with Gulf that provided, *inter alia*, for UNC to supply uranium to Gulf. Gulf subsequently assigned the contract to GAC. In December 1975, UNC brought an action against GAC in the District Court, Santa Fe County, New Mexico to invalidate that supply contract on the grounds, among others, of common law fraud and violations of New Mexico antitrust laws.[3] In April 1976, UNC amended its complaint to include a challenge, on the same grounds, to a 1974 contract with GAC that does not contain an arbitration clause.

On January 19, 1976, GAC filed an interpleader action against UNC and the utility companies in the United States District Court for the District of New Mexico (Pet. App. 3a).[4] On January 23, 1976, Gulf filed a complaint in the same court against UNC alone, seeking a determination of the validity and construction of a UNC release that Gulf alleged related to the 1973 supply agreement.[5]

[2] United Nuclear is a respondent pursuant to Rule 31 of the Rules of this Court.

[3] GAC has on several occasions placed matters arising out of this litigation before this Court. It successfully sought certiorari last term in respect of a District Court order enjoining it from instituting *in personam* actions against UNC relating to the subject matter of the state suit (*General Atomic Company* v. *Felter*, 429 U.S. 973 (1976); *id.*, No. 76-1640, decided October 31, 1977 (discussed *infra*)); it recently moved unsuccessfully to stay further proceedings in the trial court (*id.*, A-747, decided March 20, 1978); and there are currently pending before the Court, in addition to the instant motion and petition, two petitions for writs of certiorari seeking review of various District Court and New Mexico Supreme Court orders (*id.*, Nos. 77-1236 and 77-1269), to which we are today responding in a separate brief in opposition.

[4] That action was dismissed for want of jurisdiction on March 2, 1976, and the court of appeals affirmed. *General Atomic Co.* v. *Duke Power Co.*, 553 F.2d 53 (10th Cir. 1977).

[5] Gulf's complaint was dismissed on September 29, 1976, on the ground that the issue presented could be determined in the state court litigation. *Gulf Oil Corp.* v. *United Nuclear Corp.*, No. 73-032-B.

On February 17, 1976, one of the utilities, Duke Power Company ("Duke"), instituted arbitration proceedings in North Carolina against GAC under the Duke-GAC contract. On February 24, 1976, Indiana & Michigan Electric Company ("I&M") brought an action against GAC in the United States District Court for the Southern District of New York, seeking damages and specific performance of the I&M-GAC contract. In March 1976, Commonwealth Edison Company ("Commonwealth") instituted arbitration proceedings in Illinois against GAC, Gulf, and UNC under the Commonwealth (Lasalle)-GAC contract.

On April 2, 1976, Judge Felter of the New Mexico District Court, in order to forestall "vexatious and harrassing and * * * multiplicitous litigation,"[6] enjoined GAC from filing or prosecuting, other than in the district court itself, any original, third-party, or arbitration actions against UNC relating to the subject matter of UNC's suit.[7] The New Mexico Supreme Court granted an alternative writ of prohibition on April 14, 1977, staying enforcement of the injunction, but on June 16, 1977, after briefing and oral argument, that court dismissed the writ as improvidently granted.

On November 29, 1976, this Court granted GAC's petition for a writ of certiorari, vacated the judgment of the

[6] Order of April 2, 1976, *United Nuclear Corp.* v. *General Atomic Co.*, District Court of the First Judicial District, County of Santa Fe, State of New Mexico.

[7] The order expressly excepted filings or proceedings in the Santa Fe District Court from the reach of the injunction, and in open court before the order was entered Judge Felter assured counsel for GAC that GAC remained free to demand arbitration with UNC and to seek to compel arbitration in that forum. See pp. 7-8 of the Transcript of Proceedings, April 2, 1976, attached hereto as Appendix B. GAC has subsequently acknowledged that it had fully understood that it was free at any time, notwithstanding the injunction, to demand arbitration in New Mexico (see *infra*, p. 22 n.26).

New Mexico Supreme Court, and remanded to that court to consider whether its judgment was based on state or federal grounds.[8] On February 21, 1977, the New Mexico Supreme Court ruled that its judgment rested on federal grounds,[9] and on October 31, 1977, this Court again granted certiorari and summarily reversed, holding that under *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964), the State District Court was without power to enjoin GAC from initiating further actions in federal courts or invoking federal rights on the ground that such actions might be vexatious or harassing. *General Atomic Company* v. *Felter*, No. 76-1640, decided October 31, 1977.

In the meantime, I&M's suit aginst GAC in the Southern District of New York had been dismissed,[10] and at GAC's request I&M had been added as a party defendant to the Santa Fe action. The Detroit Edison Company ("Detroit Edison") had brought a complaint against GAC in Michigan state court, but that action also had been dismissed and Detroit Edison, like I&M, had been added to the Santa Fe litigation at GAC's behest. Detroit Edison is no longer a party in that case, however, having settled its differences with GAC on March 18, 1978. GAC had brought an unsuccessful action in the United States District Court for the District of North Carolina seeking to enjoin the arbitration demanded by Duke;[11] on December 14, 1977, that arbitration proceeding was settled. Upon complaint by Commonwealth, the federal courts in Illinois had ordered that the arbitration it had commenced against

[8] *General Atomic Co.* v. *Felter*, 429 U.S. 973 (1976).

[9] *General Atomic Co.* v. *Felter*, 560 P.2d 541 (1977).

[10] *Indiana & Michigan Electric Co.* v. *General Atomic Co.*, No. 76 Civ. 881 (S.D.N.Y. Jan. 5, 1977).

[11] *General Atomic Co.* v. *Duke Power Co.*, 420 F. Supp. 215 (W.D. N.C. 1976).

GAC, Gulf, and UNC should proceed.[12] Thus, the Duke-GAC and Detroit Edison-GAC disputes have been settled, the Commonwealth arbitration proceeding is now in progress, and I&M is a party in the New Mexico state court litigation.

2. GAC filed its answer to UNC's complaint on May 6, 1976. In its eighth affirmative defense it stated that it was "currently opposing arbitration with both Commonwealth Edison and Duke"; it alleged that UNC is bound by the arbitration provisions of the Duke-GAC and the Commonwealth-GAC contracts and that UNC's obligations to GAC "may be affected by the resolution of the issues with respect to which Duke and Commonwealth Edison have demanded and may demand arbitration"; and it demanded arbitration "of *only* those issues which [GAC] is ultimately required to arbitrate with Duke and Commonwealth Edison pursuant to the above contracts, and which also can be arbitrated jointly among" UNC, GAC, and the respective utility (emphasis added). GAC "[*s*]*pecifically excluded from the scope of this arbitration demand * * * all other arbitrable issues, including any concerning the validity and enforceability of* [*the 1973 UNC-GAC supply agreement*]" (emphasis added).

On November 28, 1977, following the issuance of this Court's mandate to the New Mexico Supreme Court and that court's direction to the District Court,[13] Judge Felter

[12] *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 400 F. Supp. 888 (N.D. Ill. 1975), *aff'd*, 541 F.2d 1263 (7th Cir. 1976).

[13] On November 7, 1977, one week after this Court handed down its opinion declaring the April 2 injunction in error, a hearing was held before Judge Felter on GAC's motion to dissolve the injunction immediately. At the conclusion of that hearing, Judge Felter denied the motion, ruling (Tr. 47):

> "* * * I am going to wait for the mandate. When the mandate comes down, why, I certainly intend to obey it. I am not clear as to just what the mandate is going to embrace. I am assuming that [the Supreme Court] opinion merely held that state courts cannot enjoin a litigant from filing in personam actions in federal court, which would include arbitration proceedings that may come under federal rights. But certainly it would not touch the Court's injunction insofar as it relates to filing cases in state courts that do not come under federal arbitration proceedings."

On November 10, 1977, GAC requested this Court to issue its mandate forthwith, and the mandate was issued on November 14, 1977.

entered an order (Pet. App. 27a) amending the April 2 injunction "to exclude from its terms and conditions all in personam actions in Federal Courts and all other matters mandated to be excluded from the operation of said preliminary injunction" by this Court's decision. GAC made no objection to this conforming order.

Two days later GAC moved to stay further proceedings in the District Court and announced that it was contemporaneously (1) instituting an arbitration action against UNC in North Carolina and seeking to consolidate that action with the then-ongoing Duke arbitration, (2) instituting a cross-claim against UNC in the Commonwealth arbitration in Chicago, and (3) initiating a new arbitration proceeding against UNC alone in San Diego relating to the validity and enforceability of the 1973 supply agreement "and all other arbitrable issues pending in" the District Court.[14] UNC opposed that motion and cross-moved for an order staying arbitration and for entry of a partial final judgment.

3. On December 16, 1977, the District Court granted UNC's motion to stay arbitration. In its decision accompanying that judgment, the court made these findings of fact, among others (Pet. App. 1a-7a):

> (a) that GAC has known at all material times during the course of the litigation that the 1973 supply agreement gave it a right to demand arbitration

[14] GAC's November 30, 1977 Motion for a Stay of Proceedings, p. 1.

against UNC, yet never demanded arbitration nor petitioned the court to stay the proceedings pending arbitration of any of the issues between the parties arising out of that agreement (Findings Nos. 4, 12, and 27);

(b) that the April 2, 1976 injunction did not prohibit GAC from demanding arbitration with UNC in the Santa Fe District Court (Finding No. 13);

(c) that in its answer to the UNC complaint, filed May 6, 1976, GAC specifically excluded from the scope of its arbitration demand all arbitrable issues concerning the validity and enforceability of the 1973 supply agreement (Finding No. 10);

(d) that the Duke-GAC and Commonwealth-GAC contracts contain no provisions for arbitration between GAC and UNC (Finding No. 14);

(e) that GAC on numerous occasions sought judicial determination of the rights and responsibilities of the parties under the 1973 supply agreement, *e.g.*, in its complaint in statutory interpleader filed on January 16, 1976 in the United States District Court for the District of New Mexico; in its counterclaim against UNC filed on May 6, 1976 as part of its answer to UNC's complaint; and in its motion for summary judgment filed September 9, 1977, seeking a determination that the 1973 agreement was valid and enforceable (Findings Nos. 7, 9 and 18);[15]

(f) that GAC drafted the portion of the August 22, 1977 Pretrial Order relating to its claims against UNC and did not state arbitration as a defense to the claims arising under the 1973 supply agreement or indicate a desire to resolve those issues by arbitration rather than litigation (Finding No. 17);

[15] GAC's motion for summary judgment was denied by the District Court on October 27, 1977.

(g) that pursuant to its defenses and counterclaims, GAC has engaged in extensive discovery, taking more than 100 depositions totaling more than 16,000 pages of testimony and involving 2,785 exhibits, has copied more than 500,000 pages of documents supplied by UNC pursuant to GAC discovery requests, and has propounded and received answers to two voluminous sets of interrogatories served on UNC (Finding No. 16);

(h) that UNC has made enormous expenditures of time, effort, and money in preparing its case for trial on the merits and in complying with GAC's extensive discovery demands, and that as a result of those demands GAC has acquired huge amounts of information from UNC that would not otherwise be available to it (Finding Nos. 24 and 25);

(i) that GAC filed numerous motions for extensions of time, representing to the court that the extensions were necessary to GAC's proper preparation for trial (Finding No. 21);

(j) that trial commenced on October 31, 1977, and had continued for more than one month (Finding No. 19); and

(k) that all of the issues raised in the complaint and GAC's counterclaim are inextricably intertwined with the antitrust issues raised by both parties (Finding No. 11).

Based on these findings, the District Court ruled (Pet. App. 8a) that GAC had waived any rights it may have had to arbitrate issues arising under the 1973 supply agreement with UNC, and that the Duke and Commonwealth contracts with GAC gave GAC no rights to demand arbitration with UNC. In addition, the court ruled (*ibid.*) that the state antitrust issues raised by both parties could not be submitted to arbitration, and that those issues so permeated the case that none of the issues in the case could properly be submitted to arbitration.

Accordingly, the court stayed the arbitration proceedings filed by GAC against UNC—with the caveat, however, that GAC remained free to assert any federal rights in appropriate judicial proceedings (*ibid.*).

On December 27, 1977, the District Court issued a virtually identical decision and order (Pet. App. 11a-19a), formally denying GAC's motion for a stay of trial as well as granting UNC's motion for a stay of arbitration. With respect to both the December 16 and the December 27 orders, the District Court also issued final partial judgments under Rule 54(b) of the New Mexico Rules of Civil Procedure (analogous to Rule 54 of the Federal Civil Rules) (Pet. App. 9a, 20a). GAC noticed its appeal from those orders, whereupon UNC moved in the Court of Appeals to certify the appeal directly to the New Mexico Supreme Court. On January 4, 1978, the Court of Appeals did certify the case to the Supreme Court, and on February 27, 1978, that court granted GAC's motion for expedited appeal (App. A, *infra*). As of this writing, all briefs have been filed and oral argument is scheduled before the New Mexico Supreme Court for May 2, 1978.[16]

ARGUMENT

This case does not call for the "drastic and extraordinary remed[y]" (*Ex Parte Fahey*, 332 U.S. 258, 259 (1947)) of mandamus. The District Court orders that GAC seeks reviewed are now *sub judice* in the New Mexico Supreme Court on expedited appeal, and there is no occasion for this Court to interrupt the ongoing state court appellate process. Beyond that, the District Court acted well within its jurisdiction in entering its orders—which adjudicated matters outside the compass of this

[16] On April 4, 1978, the District Court entered a declaratory judgment resolving all issues other than damages in UNC's favor, pursuant to an earlier sanctions order and default judgment. See our brief in opposition to GAC's petitions in Nos. 77-1236 and 77-1269.

Court's mandate in *General Atomic Co.* v. *Felter*, *supra*—and for that reason as well mandamus will not lie. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). Finally, the District Court decision was correct, with the result that, even if this case were otherwise suitable to review upon extraordinary writ, issuance of a mandamus would be unwarranted.

1. The peremptory writ of mandamus, like the other common law writs authorized under 28 U.S.C. § 1651, is a "drastic and extraordinary" remedy (*Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384 (1953)) that is "reserved for really extraordinary cases" (*Ex Parte Fahey*, 332 U.S. 258, 259 (1947)). The Court's power to issue the writ "is sparingly exercised" (*Parr* v. *United States*, 351 U.S. 513, 520 (1956)), and then only in "exceptional circumstances amounting to a judicial 'usurpation of power'" (*Will* v. *United States*, 389 U.S. 90, 95 (1967), quoting from *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945)).

Given the extraordinary nature of the writ, the party seeking mandamus has the burden of showing that its right to issuance of the writ is "clear and indisputable." *Will* v. *United States*, *supra*, 389 U.S. at 96; *Bankers Life & Cas. Co.* v. *Holland*, *supra*, 346 U.S. at 384; *United States* v. *Duell*, 172 U.S. 576, 582 (1899). In particular, since "the extraordinary writs cannot be used as substitutes for appeal" (*Bankers Life*, *supra*, 346 U.S. at 383), and since "whatever may be done without the writ may not be done with it" (*ibid.*), the party seeking a writ of mandamus is required by Rule 31(3) of the Rules of this Court to "set forth with particularity why the relief sought is not available in any other court."

Petitioner has failed to make and could not make such a showing, for the orders that petitioner seeks to have reviewed by mandamus from this Court are currently

pending on petitioner's expedited appeal before the New Mexico Supreme Court. The issues raised on that appeal —which appeal has been fully briefed and awaits only oral argument—include the issues raised here, and accordingly petitioner cannot say that "the relief sought is not available in any other court."

Should the District Court orders be reversed by the New Mexico Court, petitioner's claims in this Court will become moot. Should they be affirmed, petitioner may seek review of the State Supreme Court's judgment by way of a petition for a writ of certiorari pursuant to 28 U.S.C. § 1257. In either event, there is no need for this Court to interfere at this stage with the normal process of appellate review.

Our position is strengthened by the respect that this Court has ruled must be afforded state tribunals in similar situations. Indeed, we know of no case, and petitioner cites none, in which this Court has issued a writ of mandamus directly to a state trial court, thereby bypassing the state appellate courts. In *In re Blake and Others*, 175 U.S. 114, 118 (1899), where the petitioner sought relief from an alleged error in the State Supreme Court's construction of a mandate from this Court, it was held that the proper remedy was "by writ of error and not by mandamus. The remedy on error is not only entirely adequate * * * but in respect of dealing with state tribunals is manifestly the proper remedy. * * * [T]he summary character of the proceeding by mandamus renders it inappropriate in respect of the courts of another jurisdiction." [17] This decision indicates that the

[17] Petitioner's reliance (Pet. 3, 15) on *Deen* v. *Hickman*, 358 U.S. 57 (1958), is in our view misplaced. While that decision, unlike *In Re Blake and Others*, *supra*, did not insist that a challenge to a State Supreme Court's construction of a mandate from this Court be brought here by way of certiorari under 28 U.S.C. § 1257 rather than mandamus, it nevertheless illustrated—by the refusal actually to issue the writ—this Court's reluctance to rely upon a peremptory

Court is chary of resorting to the extraordinary writs where to do so would needlessly interfere with the process of the state courts. Cf. *Juidice* v. *Vail*, 430 U.S. 327, 334 (1977); *Huffman* v. *Pursue*, 420 U.S. 592, 601 (1975).

These principles of restraint apply with special force here, where the state court appellate process is in full swing and all three tiers of the state judicial system (the District Court by entering final partial judgments, the Court of Appeals by certifying petitioner's appeal, and the State Supreme Court by accepting the certification and expediting the appeal) have evidenced their concern that the issues raised here be settled promptly.

In sum, petitioner has available other remedies than the writ of mandamus, and accordingly the decisions and the Rules of this Court—and considerations of federalism and comity—dictate that petitioner's motion be denied.[18]

2. Mandamus is also unavailable in this case because the District Court acted within its jurisdiction in entering

writ directed to a state court. More importantly, *Deen* dealt with a motion for leave to file a petition for a writ of mandamus directed to the State Supreme Court: there were no further remedies available in the state court system. Here, by contrast, petitioner has further remedies available to it in the New Mexico Supreme Court and is actively pursuing those remedies.

[18] Petitioner argues (Pet. 14) that mandamus is appropriate immediately, without regard to the pending state court appellate review process, because of the expense of the ongoing trial and because, if that trial concludes before any GAC-initiated arbitration commences, the effect of any findings by Judge Felter upon such arbitration "cannot be fully anticipated." It is well-settled, however, that an extraordinary writ is "not to be used as a substitute for appeal * * *, even though hardship may result from delay and perhaps unnecessary trial * * *." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964). Accord, *Bankers Life*, *supra*, 346 U.S. at 383; *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 202-203 (1945); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30-31 (1943). In any event, that trial has been in progress since October 31, 1977. Declaratory judgment has been entered and the trial is nearing completion on the only issue—damages—that remains.

the December 16 and 27 orders. Those orders adjudicated issues not presented to or passed upon by this Court in *General Atomic Co* v. *Felter, supra*, and therefore they cannot be said to be inconsistent with the mandate in that case. "The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court * * *." *Ex Parte Union Steamboat Co.*, 178 U.S. 317, 319 (1900). See also *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 168 (1939); *Ex Parte Century Indemnity Co.*, 305 U.S. 354 (1938); *In re Potts*, 166 U.S. 263, 265-266 (1897); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-256 (1895).

The April 2, 1976 injunction against petitioner that this Court subsequently held in error was entered by the District Court and affirmed by the New Mexico Supreme Court on the grounds that the District Court possessed equity jurisdiction to enjoin GAC from instituting further actions against UNC in federal as well as state forums concerning the subject matter of UNC's suit against GAC when such actions would be "vexatious" and "harassing." [19] When the case came before this Court the dispositive question was whether the state courts' view was consistent with this Court's construction of the Supremacy Clause in *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964).

In that case this Court held invalid a state court injunction against the commencement or prosecution of federal court suits by plaintiffs who had suffered adverse rulings in state court on the very issues they sought to litigate anew in the federal courts. The New Mexico Supreme Court had distinguished *Donovan* on the ground that it was not applicable to federal court litiga-

[19] See *General Atomic Co.* v. *Felter, supra*, slip op. 5-6.

tion that was prospective rather than pending and that would be brought for "the purpose of harassment" (*General Atomic Co.* v. *Felter, supra*, slip op. 5). This Court ruled, however, that *Donovan* makes clear "that the rights conferred by Congress to bring *in personam* actions in federal courts are not subject to abridgment by state-court injunctions, regardless of whether the federal litigation is pending or prospective" (*ibid.*), and that "[f]ederal courts are fully capable of preventing their misuse for purposes of harassment" (*id.* at 7).

The Court also noted (*id.* at 5-6 & n.11) that the April 2 injunction was overbroad insofar as it restrained petitioner from attempting to invoke rights under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* It did not, however, consider or pass upon the question whether petitioner in fact had any such arbitration rights. Rather, it stated that petitioner "has every right *to attempt to*" implead UNC in the pending arbitration proceedings brought by Duke and Commonwealth, and that "[t]he right *to pursue* federal remedies * * * may no more be restricted by a state court here than in *Donovan*" (*id.* at 7; emphasis added).

By contrast, the December 16 and 27, 1977 orders that petitioner now challenges did not restrict, but explicitly excepted from their scope, petitioner's right to seek federal court adjudication of its claims. The orders denied petitioner's motion to stay the judicial proceeding pending arbitration of issues going to the validity or enforceability of the 1973 supply agreement on the grounds, among others, (1) that petitioner had waived its right to arbitrate those issues, both by specifically disavowing any intent to arbitrate them in its eighth affirmative defense to UNC's complaint and by its consistent course of conduct, before and after the effective date of the injunction, displaying an intent to litigate rather than arbitrate those issues, and (2) that, in

any event, the antitrust issues raised by both parties were so intertwined with any arbitrable issues that none of the latter could be submitted to arbitration. In view of those rulings, and the finding that the GAC-Duke and GAC-Commonwealth contracts give petitioner no right to arbitrate with UNC, the December 1977 orders also stayed petitioner from pursuing arbitration of issues between GAC and UNC either in the pending arbitration proceedings between GAC and those utilities or in separate arbitration proceedings.

Neither the issue of waiver, nor of the effect of the antitrust issues, nor of the proper construction of the GAC-Duke and GAC-Commonwealth contracts, was presented to or passed upon by this Court in *General Atomic Co.* v. *Felter*.[20] Moreover, the December 1977 orders expressly provided that they would not "operate to preclude [petitioner] from asserting claimed federal rights in appropriate proceedings" (Pet. 9a-10a), thereby protecting any rights of petitioner to institute federal judicial proceedings regarding arbitration.

In short, the December 16 and 27 orders do not, contrary to petitioner's assertion (Pet. 4), deny petitioner

[20] Thus petitioner is incorrect in stating (Pet. 14) that the waiver issues now decided by the District Court "were before this Court on its consideration of GAC's [previous] petition for a writ of certiorari" and (Pet. 13) have "already been rejected by this Court." Petitioner is also incorrect in stating (Pet. 9) that in the District Court UNC opposed the request for arbitration "for substantially the same reasons set out in its prior Brief in Opposition in this Court." In its brief in opposition in No. 76-1640, UNC argued (Br. 6-11) that in the New Mexico Supreme Court petitioner had not argued the issue of the April 2 injunction's validity insofar as it enjoined arbitration, and that petitioner had therefore waived its right to present argument on that issue to this Court. UNC did not argue that—and this Court did not consider whether—petitioner had waived its right to arbitrate. Moreover, petitioner does not even suggest that the other reasons for the holding in the December 1977 orders that arbitration is inappropriate were before this Court in the earlier proceeding.

"a right previously confirmed by this Court." Rather, the grounds relied upon by the District Court in support of those orders were "not dealt with in its former ruling and [were] not presented by the [former] petition for certiorari," *Ex Parte Century Indemnity Co.*, *supra*, 305 U.S. at 355. Therefore mandamus to review those orders will not lie.

3. Since petitioner has not shown that the relief it seeks is unavailable in any other court or that the December 16 and 27 orders of the District Court violate this Court's mandate, there is no occasion for the Court to consider petitioner's challenge to the merits of those orders. See *Bankers Life*, *supra*, 346 U.S. at 382; *Ex Parte Roe*, 234 U.S. 70, 73 (1914). Nor is there any other reason why this Court should review those orders, which are based largely on factual circumstances unique to this case. Out of an abundance of caution, however, we now show, briefly, that the District Court's rulings were correct.

Petitioner refers (Pet. 12, 13) to the District Court's "'waiver' theory" as if it were unauthorized and unprecedented. Quite the reverse is true. Petitioner's motion in the District Court to stay the trial pending arbitration invoked the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* Section 3 of that Act provides (emphasis added):

> "If any suit * * * be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which the suit is pending, upon being satisfied that the issue involved in such suit * * * is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the*

stay is not in default in proceeding with such arbitration."

If a party has "waived the right to arbitrate, that party is necessarily 'in default in proceeding with such arbitration.'" *Cornell & Co.* v. *Barber & Ross Co.*, 360 F.2d 512, 513 (D.C. Cir. 1966); see also *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 70 F.2d 297, 299 (2d Cir. 1934), *aff'd*, 293 U.S. 449 (1935). The state District Court rightly applied the federal Act to the arbitration controversy,[21] and accordingly, in passing on petitioner's motion for a stay, it was authorized, if not indeed obliged, to determine whether petitioner was "in default in proceeding with such arbitration" by reason of a waiver. In short, the ruling that petitioner was in default was fully within the court's power to enter.[22]

[21] The Federal Arbitration Act itself is not jurisdictional: resort to federal court for enforcement of a federal arbitration right must be predicated upon some independent jurisdictional ground, such as diversity. *E.g.*, *Ballantine Books, Inc.* v. *Capital Distrib. Co.*, 302 F.2d 17, 19 (2d Cir. 1962); see also 9 U.S.C. § 4. That Act, however, creates substantive federal rights, and it must be applied in diversity cases in federal courts notwithstanding inconsistent state law. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-405 (1967). If, as here, the arbitration clause appears in a contract involving interstate commerce, then the Act also applies in and must be enforced by the state courts. *E.g.*, *Boston & Maine Corp.* v. *Chicago, Burlington, & Q. R.R. Co.*, 381 F.2d 365, 366 (2d Cir. 1967), *cert. denied*, 390 U.S. 1027 (1968); *Network Cinema Corp.* v. *Glassburn*, 357 F. Supp. 169, 171 (S.D.N.Y. 1973); *West Point-Pepperell, Inc.* v. *Multi-Line Indus., Inc.*, 201 S.E.2d 452, 453 (Ga. 1973); *A/S J. Ludwig Mowinckels Rederi* v. *Dow Chem. Co.*, 307 N.Y.S.2d 660 (1970); *Miller* v. *Puritan Fashions Corp.*, 516 S.W.2d 234 (Tex. Civ. App. 1974); *Pinkis* v. *Network Cinema Corp.*, 9 Wash. App. 377, 512 P.2d 751 (1973); contra, *Pullman, Inc.* v. *Phoenix Steel Corp.*, 304 A.2d 334, 338 (Del. Super. Ct. 1973).

[22] Inasmuch as the court had power to pass upon petitioner's motion to stay the trial pending arbitration, it also possessed the concomitant power in equity to enjoin arbitration upon a determination that the agreement to arbitrate no longer existed. *A.B.C., Inc.* v. *American Fed. of Tel. & Radio Artists*, 412 F. Supp. 1077 (S.D. N.Y. 1976); *Netherlands Curacao Co.* v. *Kenton Corp.*, 366 F. Supp. 744 (S.D.N.Y. 1973); cf. *Leesona Corp.* v. *Cotwool Mfg. Corp.*, 315 F.2d 538 (4th Cir. 1963).

Moreover, in determining petitioner's arbitration rights, the District Court acted entirely within the letter and spirit of the federal Act and the relevant federal court decisions interpreting and applying that Act. Those decisions hold that, where conduct allegedly constituting waiver arises out of participation in judicial proceedings, the question of waiver is for the court, rather than the arbitrator, to decide. See *N & D Fashions, Inc.* v. *DHJ Industries, Inc.*, 548 F.2d 722 (8th Cir. 1977); *Reid Burton Constr., Inc.* v. *Carpenters Dist. Council of Southern Colorado*, 535 F.2d 598 (10th Cir. 1976, *cert. denied*, 429 U.S. 907 (1976); *Cornell & Co.* v. *Barber & Ross Co.*, *supra*; *Weight Watchers of Quebec Ltd.* v. *Weight Watchers International, Inc.*, 398 F. Supp. 1057 (E.D. N.Y. 1975); *Michael* v. *SS Thanasis*, 311 F. Supp. 170 (N.D. Cal. 1970); *Necchi Sewing Machine Sales Corp.* v. *Carl*, 260 F. Supp. 665 (S.D.N.Y. 1966); *In Re Tsakalotos*, 259 F. Supp. 210 (S.D. N.Y. 1966).[23]

The decision whether a party has waived its arbitration rights is essentially a factual one. *Carolina Throwing Co.* v. *S & E Novelty Corp.*, 442 F.2d 329, 330-331 (4th Cir. 1971); *Burton-Dixie Corp.* v. *Timothy McCarthy Constr. Co.*, 436 F.2d 405, 408 (5th Cir. 1971); *Weight Watchers*, *supra*, 398 F. Supp. at 1059; *Michael* v. *SS Thanasis*, *supra*, 311 F. Supp. at 181. The District Court's conclusion that petitioner had waived its rights was based principally on two considerations: petitioner's

[23] This Court's decision in *Operating Engineers* v *Flair Builders, Inc.*, 406 U.S. 487 (1972), is not to the contrary. There it was held that the lower courts, in ruling that they were capable of passing on the defense of laches in a suit to compel arbitration, had misapprehended the scope of the arbitration clause, which left the issue of laches to the arbitrator. *Id.* at 491. Nothing in that decision casts doubt upon the proposition that a party's "conduct before the court" creates an issue of waiver for the court to decide. *Reid Burton Constr., Inc.*, *supra*, 535 F.2d at 604.

explicit waiver, in its eighth affirmative defense, of its desire to arbitrate any issue arising under the 1973 supply agreement, and petitioner's course of conduct demonstrating its desire to litigate rather than arbitrate its dispute with UNC.

In its answer to UNC's complaint, petitioner in its eighth affirmative defense stated that it was "currently opposing arbitration with both Commonwealth Edison and Duke," and that it demanded arbitration "of *only* those issues which [GAC] is ultimately required to arbitrate with Duke and Commonwealth Edison * * * and which can also be arbitrated jointly among UNC, GAC, and the respective utility" (emphasis added). In the next sentence petitioner stated: "Specifically excluded from the scope of this arbitration demand are all other arbitrable issues, including any concerning the validity and enforceability of" the 1973 UNC-GAC supply agreement.

It is difficult to imagine a more explicit waiver of arbitration.[24] Petitioner does not mention this "[s]pecific[] exclu[sion]" in its papers in this Court; nor does it make any effort to show why, in light of this express waiver, the District Court was incorrect in ruling as it did. In our view the eighth affirmative defense, without more, unequivocally supported the District Court's ruling that petitioner had waived its right to arbitrate any issues under the 1973 supply agreement.

The District Court did not, however, rely exclusively on that express waiver. Rather, relying on persuasive

[24] "Submission of part of an arbitrable matter to a court waives the submittor's right to insist upon arbitration of the remainder." *Gutor International Ag.* v. *Raymond Packer Co., Inc.*, 493 F.2d 938, 945 (1st Cir. 1974). For that reason, in addition to the lack of any provision in the Duke-GAC or Commonwealth-GAC contracts providing for arbitration between GAC and UNC, the district court correctly ruled (Pet. App. 9a) that GAC had no right to arbitrate with UNC in the then-pending Duke or the Commonwealth arbitration proceedings.

authorities, it ruled that petitioner had also waived its right to arbitrate by taking the following actions, among others (Pet. App. 1a-7a): (1) by filing two actions against UNC prior to any injunction without demanding arbitration, see, *e.g.*, *Gutor International AG* v. *Raymond Packer Co., Inc.*, 493 F.2d 938 (1st Cir. 1974); *The Belize*, 25 F. Supp. 663 (S.D. N.Y. 1938); *Bolo Corp.* v. *Homes & Son Constr. Co.*, 105 Ariz. 343, 464 P.2d 788 (1970); (2) by filing an answer disclaiming an intent to arbitrate and by filing a counterclaim on the merits, see, *e.g.*, *Cornell & Co., supra*, 360 F.2d at 513; *American Locomotive Co.* v. *Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950); (3) by waiting until the completion of extensive discovery and by obtaining discovery advantages not available to it in arbitration, see, *e.g.*, *Cornell & Co., supra*, 360 F.2d at 513; *Liggett & Myers, Inc.* v. *Bloomfield*, 380 F. Supp. 1044 (S.D.N.Y. 1974); (4) by filing a motion for summary judgment, see *Weight Watchers, supra*, 398 F. Supp. at 1060; and (5) by generally representing to the trial court and to the parties that it was preparing to participate fully in the trial, see, *e.g.*, *Demsey Assoc.* v. *S.S. Sea Star*, 461 F.2d 1009 (2d Cir. 1972). This course of conduct, especially when considered in addition to petitioner's express waiver, fully justified the District Court's ruling that petitioner had waived its rights under the 1973 supply agreement.[25]

[25] The District Court also correctly ruled (Pet. App. 9a) that the state antitrust issues raised by both parties were not subject to arbitration. It is settled that federal antitrust issues are not arbitrable under the Federal Arbitration Act. *Cobb* v. *Lewis*, 488 F.2d 41 (5th Cir. 1974); *Helfenbein* v. *Intern'l Industries, Inc.*, 438 F.2d 1068 (8th Cir. 1971), *cert. denied*, 404 U.S. 872 (1971); *Power Replacements, Inc.* v. *Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *American Safety Equip. Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). And in New York (the only state in which the issue has been clearly decided), it has been held that state antitrust issues are not arbitrable under a state arbitration act. *Aimcee Wholesale Corp.* v. *Tomar Products, Inc.*, 21 N.Y.2d 621, 237 N.E.2d 223 (1968); *Schacter* v. *Lester Witte & Co.*, 52 A.D.2d 121, 383 N.Y.S.

Petitioner claims (Pet. 12-13) that it was barred by the April 2, 1976 injunction from seeking arbitration of its dispute with UNC, and that therefore its pursuit of judicial remedies may not be construed as a waiver of its arbitration rights. Both the premise and the conclusion are unsound. Petitioner was entirely free under the April 2 injunction to demand arbitration with UNC, subject only to the condition that, if judicial supervision of the arbitration became necessary, it would be undertaken in the District Court. At a hearing on April 2, during a colloquy on the form of the injunction to be entered and in response to a question from counsel for petitioner, the District Court made clear that petitioner was not enjoined from demanding arbitration subject to the general judicial supervision of the court (App. B, *infra*). In short, petitioner was at liberty throughout the pendency of the April 2 injunction to move to stay the Santa Fe litigation and arbitrate with rather than litigate against UNC, yet chose not to do so.[26] Instead, only one month after that injunction was entered, and at a time while enforcement of the injunction was stayed by the New Mexico Supreme Court (see p. 4, *supra*), petitioner in its answer to the complaint expressly disavowed any intent to invoke its right to arbitrate issues going to the validity of the supply contract, and its actions thereafter were consist-

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2d 316 (1976). The reasoning underlying those decisions applies with equal force here. See Loevinger, *Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U. L. Rev. 1085, 1089-1091 (1969).

[26] Petitioner has on numerous occasions acknowledged that it fully understood that the injunction left it free to demand arbitration in the Santa Fe litigation. See, *e.g.*, page 15, note, of the petition in No. 76-1640; Transcript of proceedings on November 7, 1977, relating to GAC's motion for immediate dissolution of the April 2, 1976 injunction, pp. 5-4 to 5-5; page ix, note 3, of GAC's opening brief on the appeal now pending in the New Mexico Supreme Court; and page 6 and pages 13-15, n.12 of the instant petition. In short, petitioner's statement (Pet. 12) that "[f]or more than 20 months [the April 2 injunction] prevented GAC from bringing the issues under the 1973 agreement to arbitration * * *" is simply incorrect.

ently directed towards securing a judicial resolution of its dispute with UNC. Moreover, petitioner had initiated judicial action against UNC inconsistent with any intent to arbitrate well prior to that injunction (see p. 8, *supra*).

In sum, the District Court had authority under the Federal Arbitration Act to decide whether petitioner was "in default in proceeding with" arbitration, and its determination of that issue, applying established principles of law to the particular facts of this case, was correct and does not warrant review by this Court on extraordinary writ.

CONCLUSION

The motion for leave to file a petition for a writ of mandamus should be denied.

Respectfully submitted,

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April 17, 1978.

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
SANTA FE COUNTY

Wednesday, February 22, 1978

No. 11,775

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,
vs.
GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

INDIANA AND MICHIGAN ELECTRIC COMPANY, and
THE DETROIT EDISON CO.,
Defendants-Appellees.

This matter coming on for consideration by the Court upon renewal of motion for expedited appeal, and the Court having considered said renewal of motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that renewal of motion for expedited appeal be and the same is hereby granted. The Transcript on Appeal was filed February 20, 1978; the Brief in Chief will be due on or before February 27, 1978; the Answer Brief will be due on or

before 20 days from the date of filing of Brief in Chief; Reply Brief will be due five days from the date of filing of the Answer Brief. The Court will set the matter down for oral argument as soon thereafter as the regular schedule will permit.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX B

Excerpt from the Transcript of Proceedings in the District Court of the State of New Mexico, Santa Fe County, No. 50827, on April 2, 1976 (Tr. 7-8, 21-22).

[7] THE COURT: Does United Nuclear have any objections to the terms of the Preliminary Injunction applying equally to them as it does to the Defendants?

MR. BIGBEE [Counsel for UNC]: We have no objections.

MR. THOMPSON [Counsel for GAC]: We summarize by stating that we believe that we should not be foreclosed, in spite of what the Plaintiff has stated at this point.

THE COURT: Without making any ruling on your position, it seems to me that both parties should be in the same position, one should not have privileges that the other does not have.

I cannot see how any injunction against litigation could apply to the Defendants unless it applied equally to the Plaintiff.

MR. THOMPSON: The next point—at this point, we would like to ask for clarification. I have also raised the question of the possibility of the Defendants desiring to exercise their rights to arbitration in this case, under Article 17 of the Contract, which is in issue in this case.

THE COURT: Subject to the supervision of this court.

[8] MR. THOMPSON: That is correct. We would ask that the Injunction be clear in excluding any prohibition against us demanding arbitration in this case.

MR. BIGBEE: It is clear enough anyway, anything they want to file in this action will be subject to your Honor's decision.

THE COURT: Did you, Mr. Bigbee, in your application for a Preliminary Injunction contemplate that the Defendants be enjoined from arbitrating under the Arbi-

tration Clause of the Contract in this form [*sic*] subject to the jurisdiction of this Court?

MR. BIGBEE: I did not. I understood that it may or maynot [*sic*] come up. I have asked repeatedly if they want arbitration, they have never answered me; I think they waived it. That is not the point that I wanted an Injunction on. Anything they want to submit under their responsive pleadings, under the rules, they are entitled todo [*sic*] it.

* * * *

[21] [THE COURT:] If an injunction is appropriate in this case, and I have found that it is, I think its terms and language should be very broad: I think that it is appropriate also, there is no purpose in patching all the holes in the inner tube except the one, and I cannot see where any damage will accrue to the defendants by reason of an injunction of this nature. They are not stopped from continuing to have their manufacturing process—they are not stopped in any way from fully litigating their rights. They are just limited to one form [*sic*] in doing so. I am going to grant the Preliminary Injunction with the broad language in it and the requirement that no bond or security be given. I have added at the end of the appropriate Preliminary Injunction, that the Injunction against the Defendants shall bind Plaintiff to the same terms.

MR. BIGBEE: We have no objections to that.

THE COURT: I don't think there is anything in the language here that relates to [22] arbitration in this forum pursuant to the arbitration clause contained in the contract. If there is any question about it, that can be clarified.

MR. BIGBEE: There is no question that they have the right to include that, whether it should be granted or what it is, under Your Honor's jurisdiction.

see

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